Petition

NO. 81-1001

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARK LESLIE RIVENBURGH, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT M. CIPES
1482 East Valley Rd.,A109
Santa Barbara, CA 93108
(805) 966-7626

Counsel for Petitioner

November 25, 1981

QUESTION PRESENTED

Whether this Court should exercise its supervisory powers over federal administration of criminal justice to correct a defect in the appeals process attributable in part to malfunction in the highly bureaucratized structure of the Ninth Circuit Court of Appeals?

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NO. 81-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

MARK LESLIE RIVENBURGH, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Mark Leslie Rivenburgh respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 27, 1981.

OPINIONS BELOW

The unreported order of the Court of Appeals of which review is sought appears in the Appendix to this petition (App. 1). The unreported Memorandum of the Court of Appeals,

affirming petitioner's conviction, also appears in the Appendix hereto (App. 3 - App. 12).

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered on August 27, 1981. No petition for a rehearing was filed. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1). This petition will be filed on November 25, 1981, timely under 28 U.S.C. 2101(c) and this Court's Rule 20.2 (as interpreted by this Court). Federal jurisdiction was originally invoked in the district court (W.D. Wash.) under two federal criminal statutes, 18 U.S.C. §§ 2031, 2011.

STATEMENT OF THE CASE

Convicted after a 4-day jury trial of rape and robbery on a federal reservation (Mt. Rainier National Park), petitioner was sentenced in 1978 to an aggregate sentence of 45 years which he is serving at the U. S. Penitentiary at Lompoc, California. Petitioner was sentenced to twenty years each on two rape counts and five years on the robbery count, said sentences to run consecutively, for a total of 45 years.

The trial took place in Tacoma, near the National Park, three months after the crimes were committed, before a jury consisting of five members who admitted a predisposed opinion

of petitioner's guilt, having been exposed to highly inflammatory publicity which had saturated local news media. None of these jurors were challenged for cause by (retained) trial counsel, nor did counsel move before trial for a change of venue or a continuance until the virulent effects of the publicity had abated.

Petitioner was convicted largely on the basis of circumstantial evidence. Eyewitness testimony of the two victims was equivocal since the assailant had worn a ski mask, leaving only his eyes visible. At the line-up one of the victims identified a man other than petitioner with the statement: "I'll never forget those eyes." The other victim based her line-up identification of petitioner on height, voice, general body build, and the way he moved. Her original report had described a person of shorter height and somewhat different build. She admitted in her testimony to having received information prior to the line-up about petitioner's height, weight, and general appearance from the news media accounts of the events.

The most damaging aspect of the circumstantial evidence and of the prejudicial publicity was petitioner's five-day flight through the National Park after a strange altercation with an FBI agent who sought to question him. Peti-

tioner, a member of the elite Army Ranger unit ("black berets"), testified that he avoided further contact with the agent because the latter's revolver-hand was shaking and he was generally "unprofessional". There was also testimony that petitioner's 'trained paranoid instinct' had been triggered by his receiving a Ranger "danger signal" from his friend just prior to being approached by the FBI agent. The Park was closed to the public during petitioner's flight (he later turned himself in) and an atmosphere of hysteria was generated in the area by sensational news media accounts emphasizing petitioner's Ranger training and dangerousness. The single most prejudicial feature of the publicity was the fact that the initial media accounts of the crime provided an actual description of petitioner (not of the individual described by the victims) without naming him, even though his identity as a suspect was known to the FBI and in fact formed the basis of the publicized description. Thus, when later accounts provided petitioner's name and identity, it appeared to anyone following the sensational story that the assailant had been unequivocally identified as petitioner.

At the outset of the trial the prosecutor's motion to preclude evidence of a dismissed state

rape indictment was granted, despite the fact that the prosecutor--before the dismissal--had given the defense notice of his intention to use the state charge as a prior similar act.

Following petitioner's conviction and sentence, trial counsel withdrew from the case and petitioner was granted leave to appeal in forma pauperis, the Federal Public Defender (W.D. Wash.) being appointed to represent him on the appeal. Bail pending appeal was denied and petitioner was incarcerated during the year-long appeal process in a prison more than 1,000 miles from the office of his appellate counsel whom he never met.

In preparing the appeal, the Public Defender filed a Designation of Reporter's Transcript (in which the Government joined) calling for inclusion in the Record on Appeal of a transcript of the entire proceedings. This decision was necessary of course because the Public Defender had not represented petitioner at the trial and had no familiarity with what had transpired in the case prior to his appointment.

Numerous delays were experienced in the furnishing of the transcript, a situation not at all uncommon in the Western District of Washington, as well as in many other federal districts. When the transcript was finally delivered to

the clerk of the district court on April 23, 1979, for filing with the court of appeals, it consisted of only the trial phase of the district court proceedings. The defect was not discovered by anyone concerned with the appeal. Omissions consisted of: transcripts (or tapes) of the initial appearance before the magistrate (involving another altercation between petitioner and the FBI agent), of the arraignment, the pleas, and the proceedings on sentencing. It is unclear on the present record the extent to which there were also omitted certain proceedings in open court during the trial but outside the presence of the jury.

In failing to examine the Record on Appeal with sufficient care to discover the transcript omissions, and in certifying the completeness of the Record on Appeal despite such omissions, the court reporter and the district court clerk violated the provisions of the Federal Rules of Appellate Procedure and of the Rules of the Court of Appeals for the Ninth Circuit. Appellate Rule 11(e); Ninth Circuit Rule 4(f). As for the Court of Appeals itself, it violated its own administrative practice designed to protect the integrity of the record upon which a criminal conviction is reviewed. In the Court of Appeals

the clerk's function of inspecting the record is delegated to the "inventory coordinator" who initially "screens" new cases and "rejects those that have incomplete files." Hellman, Central Staff in Appellate Courts: The Experience of the Ninth Circuit, 68 Calif. L. Rev. 937, 957 (1980).

Petitioner's appeal was finally argued and decided in late 1979. The Public Defender's contentions on appeal included the question of prejudicial publicity--without reference to transcripts of pretrial proceedings--and the question of ineffective assistance of trial counsel, without reference to either pretrial or post-trial proceedings. The presentence report of the probation service was not included in the Record on Appeal.

The unreported memorandum of a panel of the court of appeals, affirming petitioner's conviction, was filed on December 17, 1979. (See text as App. pp. 3-12.) No application for a rehearing was made nor was a certiorari petition filed in this Court.

The omission of transcripts was not discovered until April 30, 1981, when petitioner's present counsel personally inspected the district court file of the case in Tacoma. A motion

to recall the mandate, based upon the defective Record on Appeal, was filed by counsel in the Ninth Circuit on July 17, 1981, and denied by the original panel in an order entered August 27, 1981. (See App. pp. 1-2.) There was no application for a rehearing.

The court of appeals decided the motion to recall the mandate without examining the omitted transcripts. As of this writing, more than three years from the date of filing petitioner's notice of appeal, the omitted transcripts have not been furnished, despite repeated efforts by petitioner's counsel to obtain them.

REASONS FOR GRANTING THE WRIT

1. THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS IS PECULIARLY APPROPRIATE HERE BECAUSE THE FEDERAL APPEALS COURT WHOSE ACTION IS CHALLENGED HAS, IN ITS ORGANIZATION AND OPERATIONS, DEPARTED RADICALLY FROM THE TRADITIONAL MODEL OF APPELLATE COURT ADMINISTRATION.

> "The Ninth Circuit encompasses nine states--Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington--as well as Guam and the Northern Mariana Islands, a region that stretches over 5,000 miles from east to west and 1500 miles from north to south."

Neisser, Riding Herd on the Backlog: The Ninth Circuit's Approach, Calif. St. B.J., Mar. 1981, p.96. In addition to the circuit's 23 active judges, each with three "elbow" law clerks, circuit personnel consists of a circuit executive and supporting staff, a chief clerk and supporting staff, and a "Central Staff" budgeted at more than $1,000,000 and consisting of some thirty attorneys. For a detailed description of these operations, see Hellman and Neisser articles, supra, and Ubell, Report on Central Staff Attorneys' Offices in the United States Courts of Appeals, 87 FRD 253, 293-303 (1980).

As pointed out in the Statement of the Case, the failure to discover the transcript omissions here--at the appellate level--was attributable to the Central Staff's inventory coordinator. In arguing the motion below, counsel attempted to tie the specific error committed here to the inherent prejudice to an indigent criminal appellant when the Central Staff, after a very brief review of the files, assigns a low "weight" to the appeal and forwards a bench memorandum to the assigned panel of judges, recommending that the appeal be affirmed. See Hellman, supra, at 996, pointing out

> "the danger that cases on the 'fast track' will receive less attention than is their

> due. To some extent, the problem involves a self-fulfilling prophecy: once the cases have been tagged as losers, it is all too easy for the judges to give them minimal scrutiny and perhaps miss difficulties or complexities that did not emerge in the initial screening."

Thus, counsel argued below that "prejudice which inheres generally when appeals are 'tagged as losers' takes on a concrete and specific character because the inventorying process was defective ab initio." This was by no means the only argument raised below but it is necessary to refer to it at this point to place in context the material in the first paragraph of the court of appeals order.

Counsel does not question the necessity for an overburdened appellate court to have substantial staff assistance. My concern is for my client and other indigent appellants whose rights in our highly flawed adversary system are consigned to the protection of an institutional defender, often as victimized by excessive caseloads as the court itself. Overburdened practitioners in overburdened court systems create a statistically high probability of error.

The sins of bureaucratic omission are no less damaging to individuals because they take place without malicious intention, or indeed

without any intention at all. As systems designed to protect individual rights increasingly lose touch with the character in which they were originally conceived, as they grow more complex and fragmented (even as they paradoxically purport to grow more "centralized"), the function for a Supreme Court which takes seriously its supervisory role is to maintain a posture of watchful caring. Participants in these increasingly faceless systems will be motivated to maintain the tradition of personal responsibility only if institutions such as this Court retain the will and the capacity to encourage the preservation of traditional civilized standards of administration.

2. SITTING IN JUDGMENT ON THE EFFECT OF ITS OWN ERROR IN HEARING AN APPEAL ON A DEFECTIVE RECORD, THE COURT OF APPEALS HAS COMPOUNDED THE ERROR BY (A) FAILING TO CALL FOR AND EXAMINE THE OMITTED TRANSCRIPTS, AND FAILING TO EXERCISE ITS DISCRETION WITH REGARD THERETO; (B) MISAPPLYING ITS OWN TEST OF WHAT CONSTITUTES PREJUDICIAL ERROR IN A CASE LIKE THIS; AND (C) UNFAIRLY SHIFTING THE BURDEN OF RESPONSIBILITY FOR THE ERROR TO THE PUBLIC DEFENDER.

The problem of furnishing transcripts to effectuate the right of appeal, as reflected by the facts of this case, is not new to this Court. In a distinguished line of cases this Court has emphasized the importance of providing transcripts to indigents to preserve equality of justice and appellate due process. The Court, moreover, has expressed its deep concern with the relation of the transcript problem generally to widespread delays in the federal appellate system, as evidenced by the 1979 amendments to the Federal Rules of Appellate Procedure.

Although the order below to a certain extent merges the separate questions of (1) error in the transcript omissions[1], and

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[1]. The order states, almost as an afterthought, that "the rule upon which the present counsel relies was not in effect at the time pertinent to this appeal." The court is referring to Appellate Rule 11(b), although as The Statement of the Case indicates, this was not the only rule violated. Because of present counsel's conviction that Rule 11(b) was merely declaratory of existing practice, he failed to bring to the attention of the court of appeals the text of this Court's order of April 30, 1979, which states that the 1979 amendments "shall take effect on August 1, 1979, and shall govern all appellate proceedings thereafter commenced and insofar as just and practicable, all proceedings then pending." (Emphasis supplied.)

(2) the prejudicial effect of such error, the key sentence in the order, in terms of what the court was deciding, seems to be the following: "Present counsel for Rivenburgh fails to cite the relevance of any omission in the record to any issue on appeal other than in the most vague generalities."

The court of appeals is somewhat less than fair in faulting counsel for engaging in generalities when, as the court knew from the affidavit attached to the motion, counsel has made every possible effort to obtain the omitted transcripts for examination[2]. Indeed, the court has left itself open to criticism for deciding this motion without exercising its power to require the reporter to produce the omitted transcripts for examination. Had the court read the transcripts and concluded that the contents were irrelevant or immaterial in terms of appellate issues, the present posture of this proceeding would be very different. Assuming arguendo that a motion to recall a mandate in a due process context is discretionary, the fact remains that so far the court of appeals has failed to exercise its discretion.

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2. Had counsel waited to file the motion until the transcripts were produced, the motion obviously would have failed for dilatoriness.

Leaving all this aside, counsel insists that his arguments below are more than generalities. He pointed out, for example, that under Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979) (en banc)--on which the court of appeals relied in affirming petitioner's conviction--it is inconceivable that a claim of ineffective assistance of trial counsel can be intelligently adjudicated without an examination of his performance in the entire proceedings. See 586 F.2d at 1333: "Prejudice may result from the cumulative impact of multiple deficiencies." As pointed out in the Statement of the Case, trial counsel failed to take any of the pretrial steps necessary to protect petitioner from the effects of the highly prejudicial publicity, a glaring omission which was not raised by the Public Defender on appeal.

As to the sentencing proceeding and trial counsel's performance therein, without the transcript it remains to this day something of a mystery why the 45-year sentence was imposed. My argument below pointed out that a court of appeals has the undisputed power to review the process which underlies the imposition of a particular sentence, as distinguished from the sentence itself, to insure the observance of

fundamental fairness. I personally find it shocking that not a single judge or judicial clerk involved in adjudicating this appeal had the interest, nor even the curiosity, to inquire into the sentencing process, particularly in a court which apparently prides itself on bridging the gaps caused by the inadequacies of appellate counsel. See Hellman, supra at 965; Ubell, supra at 301.

We come finally to the unpleasant subject of the Public Defender's performance in arguing this appeal and to the way in which the court of appeals exploited its intimate relationship with that official to avoid sharing responsibility for the embarrassing error which occurred here[3]. The first sentence of the order states: "This case was thoroughly briefed and argued by able and experienced counsel." And later, in considering the prejudicial effect of the transcript omissions, the court says: "There is no indication that all portions of the record deemed relevant by the experienced counsel representing appellant on this appeal was [sic] not before this court." Besides the dubious propriety of taking judicial notice of a matter so subjective as a lawyer's expertise, the court

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3. See discussion in footnote 16 of Ferri v. Ackerman, 444 U. S. 193, 199 (1979).

seems to indulge in the assumption that having read the entire contents of the omitted transcripts, the Public Defender made a conscious and deliberate decision not to utilize anything therein in arguing the appeal, as well as the decision not to inform the court that the transcript designation had somehow been modified. Needless to say, there is nothing whatever in the record of the case regarding the Public Defender's thoughts or actions with respect to the question of omitted transcripts.

In its opposition to this motion below, the United States Government suggested that a proper and equitable solution to the problem, from the petitioner's standpoint, would be to file a post-conviction motion based upon the Public Defender's ineffectiveness in failing to realize, or disclose, the omissions. Cf. United States ex rel. Burton v. Greer, 643 F.2d 466, 468 (7th Cir. 1981). After his experiences thus far in the criminal justice system, petitioner obviously has no desire to enter the maze of post-conviction gamesmanship where, ironically, he would find himself no longer entitled as of right to the same omitted transcripts which were theoretically guaranteed him under the Criminal Justice Act three years ago. See United States v. MacCollom, 426 U.S. 317 (1976).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Ninth Circuit.

Respectfully submitted,

Robert M. Cipes

ROBERT M. CIPES
Counsel for Petitioner

November 25, 1981

Appendix

APPENDIX

FILED
Aug. 27, 1981
Richard H. Deane
Clerk, U. S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 79-1114
MARK LESLIE RIVENBURGH, Appellant.	)	D.C. No. CR78-42T
	)	ORDER

Appeal from the United States District Court for the Western District of Washington

Before: COWEN*, Court of Claims Judge, and TRASK and HUG, Circuit Judges.

This case was thoroughly briefed and argued by able and experienced counsel. The judges on this panel carefully reviewed and considered all of the arguments raised on appeal. Many hours of judicial time was spent on this appeal. Any conception by counsel that thorough consider-

*The Honorable Wilson Cowen, Senior United States Court of Claims Judge, sitting by designation.

ation of every case is not given by the members of this court and the judges sitting by designation, regardless of how that case happens to be inventoried, is completely erroneous.

There is no indication that all portions of the record deemed relevant by the experienced counsel representing appellant on this appeal was [sic] not before the court. Present counsel for Rivenburgh fails to cite the relevance of any omission in the record to any issue on appeal other than in the most vague generalities. Furthermore, the rule upon which the present counsel relies was not in effect at the time pertinent to this appeal.

Good cause has not been shown for the extraordinary relief sought. The motion to recall the mandate is denied.

APPENDIX

FILED
Dec. 17, 1979
Richard H. Deane
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mark Leslie Rivenburgh, Defendant-Appellant	)	No. 79-1114
v.	)	D.C. No. CR78-42T
United States of America, Plaintiff-Appellee.	)	MEMORANDUM

Appeal from the United States District Court
for the Western District of Washington
The Honorable Jack E. Tanner, Presiding

Before: COWEN*, Court of Claims Judge, and
TRASK and HUG, Circuit Judges.

Mark Rivenburgh appeals from a jury conviction of two counts of rape, in violation of 18 U.S.C. § 2031, and with taking money by force and violence, in violation of 18 U.S.C. § 2111. Rivenburgh asserts six contentions on appeal: (1) that the trial court improperly excluded evidence of a dismissal of a state charge;

*The Honorable Wilson Cowen, Senior Judge, United States Court of Claims, sitting by designation.

(2) that the trial court erred in limiting the voir dire examination of the prospective jurors in light of substantial pretrial publicity; (3) that the trial court erred in failing to grant him an additional peremptory challenge; (4) that the trial court erred in failing to exclude Juror Zelenak for cause; (5) that he was improperly tried by a jury consisting of individuals predisposed toward a guilty verdict; (6) that he was deprived of his Sixth Amendment right to a fair trial because of ineffective assistance of counsel. We reject all six contentions and affirm the conviction.

(1) Evidence concerning the state charge:

Prior to trial, the trial court granted the government's motion in limine to preclude reference to a state charge against Rivenburgh for kidnapping and assault, which had been dismissed. The state charge arose from an incident which occurred at the Seattle-Tacoma International Airport two months prior to the criminal acts which resulted in the present action. Shortly before the trial in this case, the state charge was dismissed with prejudice because it was established that Rivenburgh had been misidentified as the assailant. Rivenburgh's trial counsel argued that the dismissal of the state charge was admissible as relevant to establish bias in the investigation and identification procedures.

The district court granted the motion in limine, finding that the incident at the airport was not even remotely connected to the present case. Appellant's argument at trial was that FBI agent Rudy, had participated in both investigations, and that the misidentification in the state action indicated a bias which affected the identification process in this federal action. We agree with the district court that this argument is not persuasive. No challenge was made to the line-up or identification procedures in the federal case and the record indicates that these procedures were carried out fairly. Although agent Rudy was a witness to appellant's actions at Narada Falls the day after the attack, two park rangers also were present at that time and also confirmed agent Rudy's observations.

Appellant also advances, for the first time on appeal, an additional argument for admission of the evidence, under Fed. R. Evid 404(b) and the doctrine of Holt v. United States, 342 F.2d 163 (5th Cir. 1965). The brief of the government aptly distinguishes the Holt case from this case. In Holt the offenses and the methods of operation were very similar. In this case, the attack at the airport was under entirely different circumstances than those in the national park. There was really no factual similarity between these two incidents other than that Rivenburgh was a suspect in both.

The D.C. Circuit in United States v. Hallman, 439 F.2d 603, 605 (D.C. Cir. 1971), rejected a similar argument based on the Holt case stating:

> That kind of evidence [dismissal of offense] is material, e.g., when it tends to show that someone similar in appearance to defendant was perpetrating criminal activity similar to the charges at trial. Holt v. United States, 342 F.2d 613 (5th Cir. 1965); Commonwealth v. Murphy, 282 Mass. 593, 185 N.E. 486 (1933). Appellant's trial counsel did not bring out any relationship between the two charges (other than they were both for robbery), did not, e.g., proffer that there was any similarity between the two offenses in terms of modus operandi...

We find the similarity between the two events, in this case, was slight and there was no error in the exclusion of the evidence.

(2) Limited voir dire examination.

Rivenburgh contends that the trial judge erroneously limited his voir dire examination concerning the prospective jurors' exposure to extensive pretrial publicity. He asserts that the judge limited voir dire to general questions concerning the pretrial publicity and then a conclusory, subjective question of whether the juror could be fair and impartial, knowing what he knew. He relies upon Silverthorne v. United States, 400 F.2d 627 (9th Cir.

1968), cert. denied, 400 U. S. 1022 (1971), and contends that under the doctrine of that case the jurors should have been examined more specifically about the publicity to which they were exposed and the effect it had upon their impartiality.

Defense counsel and the district court were both quite conscious of the Silverthorne decision and defense counsel's request for individual examination of the jurors was granted as suggested by Silverthorne. The court also made clear to both counsel that they could examine jurors after his preliminary questions. Both counsel did so and our review of the record does not reveal that this examination was unduly restricted. The only aspect of the pretrial publicity that the trial judge actually precluded Rivenburgh's trial counsel from exploring was the dismissal of the state charge.

The appropriate area of inquiry was the jurors' exposure to pretrial publicity and its possible prejudicial effect on the juror. As the district court ruled, it was not proper to utilize this occasion to bring to the attention of the jurors that a state rape charge against the defendant had been dismissed. Rivenburgh's trial counsel had a free hand in questioning the prospective jurors. The trial judge not

only conducted a voir dire examination of each juror individually, but more importantly, he allowed both the prosecutor and Rivenburgh's trial counsel to conduct a voir dire examination of each juror individually. While it is true that the trial judge did limit his examination principally to the jurors' subjective assessment of their own impartiality, it was left to Rivenburgh's trial counsel to probe the prospective jurors further to demonstrate any possible prejudice that might have existed as a result of the pretrial publicity if he chose to do so as a tactical matter. Indeed, a trial attorney could reasonably decide that the detailed questioning of jurors about publicity could create greater risks of prejudice to the defendant by bringing the publicity to their attention. Rivenburgh's trial counsel did not object to any limitation, he may have believed had been imposed. Objections not made at trial cannot be raised on appeal, absent the presence of plain error. United States v. Helina, 549, F.2d 713, 718 (9th Cir. 1977). There was no plain error involved here.

It should be noticed that the pretrial publicity involved in this case was by no means the highly inflammatory publicity which exploits and exposes the past misdeeds or unsavory background of the defendant that is sometimes asso-

ciated with a case of this nature. The publicity in this case dealt with the facts involved in the two rapes, the fact that Rivenburgh was being sought as a suspect and the progress of the search for him. Thus, the pretrial publicity as it related to Rivenburgh dealt mostly with Rivenburgh's identification as the suspected assailant. There is a substantial difference between publicity which deals with the crime itself and the identification of a suspect as opposed to publicity which exploits the suspect's past misdeeds, or is concerned with prejudicial matters that would be excluded at trial. In the present case there was little in the publicity which did not ultimately come out at trial, with the exception of the state charge which had been brought and dismissed. A defense counsel in these circumstances could quite reasonably decide not to go into detail in his examination concerning pretrial publicity.

(3) The additional peremptory challenge.

Rivenburgh argues that under Rule 24, Fed. R. Crim. P., he should have had another peremptory challenge in addition to his 10 peremptory challenges, because two alternate jurors were selected. Rule 24 (c), Fed. R. Crim. P., expressly states the "additional peremptory challenges may be used against an alternate juror only." Because

neither of the alternate jurors was seated as a juror and neither participated in any way in the deliberations or return of the verdict, Rivenburgh was not prejudiced by the fact that he was not given an additional peremptory challenge.

(4) Failure to excuse Juror Zelenak.

Rivenburgh contends that the trial judge erred in rejecting his challenge to excuse Juror Zelenak for cause on the grounds of bias. Given the rather casual acquaintance of Juror Zelenak and witness Thompson, we cannot say that the trial judge abused his discretion in rejecting Rivenburgh's challenge for cause. See United States v. Taylor, 554 F.2d 200, 202 (5th Cir. 1977).

(5) The jurors predisposition.

Rivenburgh contends that he was improperly tried by a jury predisposed toward a guilty verdict. Although five of the jurors actually seated expressed some type of preconceived notion concerning Rivenburgh's guilt, these expressions did not evidence a bias that would deprive Rivenburgh of his due process right to a fair trial. The preconceptions expressed by the jurors in this case in no way rise to the egregious level expressed by the jurors in Irvin v. Dowd, 366 U.S. 717 (1961). As the Supreme Court stated in Dowd:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 723 (citations omitted).

(6) Ineffective assistance of counsel.

Rivenburgh argues that he was denied his Sixth Amendment right to a fair trial because of ineffective assistance of counsel: (1) He points to the fact that trial counsel did not argue that the dismissal of the state prosecution charge should have been admissible under Fed. R. Evid. 404 (b) as a similar act; (2) He argues that trial counsel performed an inadequate voir dire examination because he limited his questions to the jurors' subjective evaluation of their impartiality; and (3) He further notes that trial counsel failed to demand an additional peremptory challenge under Fed. R. Crim. P. 24.

As we have discussed, the decision of the trial court to grant the motion in limine excluding evidence concerning the state action was proper whether considered in light of the biased investigation objection or the 404 (b)

argument. The decision of defense counsel not to examine the jurors in greater detail about the pretrial publicity, as discussed above, was a reasonable tactical decision. The failure to require an additional peremptory challenge for the alternate jurors was of no consequence since the alternates did not serve. The allegations concerning the shortcomings of the defense counsel do not constitute ineffective counsel under the standards set forth in Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979) (en banc).

The judgment of conviction is affirmed.

Opposition

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FILED
MAR 5 1982
ALEXANDER L. STEVAS,

No. 81-1001

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARK LESLIE RIVENBURGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner's motion to recall the mandate of the court of appeals, affirming his conviction, should have been granted because the record on appeal did not include the transcripts of certain proceedings ancillary to the trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1001

MARK LESLIE RIVENBURGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1981. The petition for a writ of certiorari was filed on November 25, 1981.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on two counts of rape, in violation of 18 U.S.C. 2031, and on one count of taking money by force, in violation of 18 U.S.C. 2111. He was sentenced to consecutive terms of 20 years' imprisonment on each of the rape convictions and five years' imprisonment on the robbery conviction. The court of appeals affirmed (Pet. App. 3-12). Nearly

two years later petitioner filed a motion to recall the mandate, claiming that the decision by the court of appeals had been based upon an incomplete record. The court of appeals denied the motion (Pet. App. 1-2).

The evidence at trial showed that on June 3, 1981, petitioner raped and robbed two women at gunpoint in Mount Rainier National Park in Washington (Tr. 269-279, 284, 312-325, 502).[1] When the FBI and park rangers attempted to question him, petitioner fled into the park, where he eluded capture for one week before surrendering (Tr. 402-406, 411-413, 432-442, 475-477, 504-510, 561-562, 581-582, 679-680).

ARGUMENT

Petitioner contends (Pet. 8-9, 11-16) that the mandate of the court of appeals affirming his conviction should have been recalled because the record on appeal was incomplete. Recall of a mandate is warranted only in exceptional circumstances. See, *e.g.*, *Ordonez* v. *United States*, 588 F. 2d 448, 449 (5th Cir. 1979); see generally *American Iron and Steel Institute* v. *EPA*, 560 F. 2d 589, 592-595 (3d Cir. 1977). Such circumstances clearly are not present here.

The public defender assigned to represent petitioner on appeal filed a "Designation of the Reporter's Transcript," calling for inclusion in the record on appeal of a transcript of the entire trial proceedings. In addition, counsel specifically designated the transcripts of the following proceedings as the "Record on Appeal": arraignment and plea, continuances, proceedings on motions, proceedings outside the presence of the jury, sentence, and preliminary and initial

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[1] "Tr." refers to the transcript of the trial, which took place on September 25-28, 1978.

hearings.[2] The only transcripts filed by the court reporter with the clerk of the district court and sent to counsel, however, were of the actual trial proceedings.[3] Petitioner's counsel never voiced any objection to receiving a transcript of only the trial proceedings, or requested the court reporter to provide him with the additional transcripts.[4]

Petitioner's counsel filed a 42-page appellate brief, urging as grounds of reversal numerous alleged trial errors. In particular, counsel asserted: (1) that the trial court improperly excluded evidence of a dismissal of a state charge; (2) that the trial court erred in limiting the voir dire examination of the prospective jurors in light of substantial pre-trial publicity; (3) that the trial court erred in failing to grant him an additional peremptory challenge; (4) that the trial court erred in failing to exclude a juror for cause; and (5) that he was improperly tried by a jury consisting of individuals predisposed toward a guilty verdict (Pet. App. 3-4). Petitioner's counsel also filed a reply brief, alleging for the first

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[2]Petitioner's counsel filed the designation of the record with the clerk of the trial court, but he failed to comply with 9th Cir. R. 4(c), which required that he "specify the name, address and telephone number of the reporter(s) who will be preparing the transcript(s), the date the transcript(s) was (were) ordered, the date the reporter(s) acknowledged receipt of the order(s), and the reporter(s)' estimated date of delivery of the finished transcript(s)."

[3]Petitioner was tried in Tacoma. We are advised by the court reporter that he dictated his tapes of the trial for his secretary to transcribe in Spokane, where the trial court was then sitting. He also dictated the tapes of the September 22, 1978 plea proceedings and the November 3, 1978 sentencing proceedings, anticipating that defense counsel might designate the transcript of these proceedings as part of the record on appeal. Due to a mix-up, his secretary only transcribed, and sent to the clerk of the court in Tacoma, the actual trial proceedings.

[4]Thus, this case is unlike *Hardy* v. *United States*, 375 U.S. 277 (1964). The issue here is simply whether an attorney's decision to proceed without the requested transcripts required a recall of the mandate, not whether he was entitled to the transcripts.

time that to the extent the trial errors complained of in his opening brief were attributable to defense counsel, petitioner had been deprived of the effective assistance of counsel at trial (see Appellant's Reply Brief 1-5). The court of appeals examined each of these claims, rejected them, and affirmed petitioner's conviction (Pet. App. 4-12).

Nineteen months later petitioner filed a motion to recall the mandate, claiming that the integrity of the appellate process had been vitiated because transcripts of proceedings ancillary to the trial, which had been designated as part of the record on appeal, had not been included.

a. Most of the petition is devoted to criticizing court personnel and the procedure for processing appeals in the Ninth Circuit, but petitioner's claim is essentially that his attorney's decision to proceed in the court of appeals without securing the additional transcripts requires recall of the mandate. Petitioner does not even suggest that he was prejudiced in any way by his attorney's decision. Contrary to petitioner's assertion (Pet. 15-16), having read the extensive briefs filed by petitioner's prior counsel, the panel was not required to take "judicial notice" of the attorney's incompetence. Moreover, given the obvious thoroughness of the briefs filed on petitioner's behalf by his attorney, the panel reasonably dismissed as unworthy of serious consideration the unlikely hypothesis that the attorney overlooked the omissions and concluded that (Pet. App. 2) "all portions of the record deemed relevant" by the attorney were before the court. Without some suggestion that the omitted transcripts revealed reversible error or at least contained information pertinent to the prior decision, the attorney's decision to proceed without reviewing the transcripts obviously provided no basis for recall of the mandate of the court of appeals.

By letter dated December 7, 1981, petitioner's current counsel represented to this Court that on November 30,

1981, he had received from the court reporter transcripts of the sentencing hearing and the hearings on two unidentified pretrial motions.[5] He has made no attempt, however, to demonstrate the significance of anything in those transcripts, or how petitioner was prejudiced by his prior attorney's decision to proceed without them. Accordingly, there is no basis for disturbing the panel's exercise of discretion to deny petitioner's belated motion to recall the mandate.

b. Petitioner also complains (Pet. 6, 12 n.11) that the court reporter and district court clerk violated Fed. R. App. P. 11(b). The Rule provides that the district court clerk is to transmit the record on appeal to the clerk of the court of appeals when it is "complete." Further, the rule provides that if the court reporter cannot complete and file the transcript with the district court within 30 days of receiving an order, it is the reporter's duty, and not that of the attorney ordering the transcript, to request an extension of time from the clerk of the court of appeals. As the court below noted in denying the motion to recall the mandate (Pet. App. 2), current Rule 11(b) did not go into effect until August 1, 1979—some two months after petitioner filed his brief on appeal. In any event, if the reporter's failure to transcribe the ancillary proceedings and the district court clerk's failure to ensure that the record contained such transcripts before certifying the record as complete and

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[5]These are the only transcripts that were designated but inadvertently omitted from the record on appeal. As the government noted in its opposition to petitioner's motion to recall the mandate, petitioner's initial appearance and arraignment was not stenographically recorded; pursuant to court practice in the Western District of Washington, these proceedings were recorded on tapes which were then stored in the magistrate's office. There was no hearing on the continuance motion. All trial proceedings held outside the presence of the jury (despite petitioner's contrary suggestion) were transcribed as part of the three-volume reporter's transcript. There was no preliminary hearing in this case.

transmitting it to the court of appeals, constituted violations of the Federal Rules of Appellate Procedure, the violations were harmless.[6]

Relying on *Cooper* v. *Fitzharris*, 586 F. 2d 1325, 1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979), petitioner claims (Pet. 14) that in order to review adequately a claim of ineffective assistance of trial counsel, a court of appeals must examine counsel's performance throughout the entire proceedings. The court in *Cooper*, however, merely stated that when counsel is charged with multiple errors at trial, prejudice may result from the cumulative impact of the errors. Nothing in *Cooper* remotely suggests that when, as here, a court of appeals has examined and rejected a claim of ineffective assistance founded upon specific acts and omissions of defense counsel at trial, the court has a further obligation to peruse the entire record in search of errors not even asserted by counsel on appeal.[7]

c. Finally, petitioner asserts (Pet. 8-11) that on appeal the "Central Staff's inventory coordinator" assigned his case a low "weight," and that once his case had been "tagged

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[6]Moreover, appellate counsel had the primary burden of bringing such omissions in the record to the attention of the court of appeals. Fed. R. App. P. 10(e) provides that "[i]f anything material to either party is omitted from the record by error or accident * * * *the parties by stipulation*, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, *on proper suggestion* or on its own initiative, may direct that the omission * * * be corrected, and if necessary that a supplemental record be certified and transmitted" (emphasis added).

[7]There is no merit to petitioner's suggestion (Pet. 14-15) that the court of appeals on direct review should have inquired into the sentencing procedure in this case. Since counsel on appeal chose not to challenge either petitioner's sentence or the sentencing procedure, the court of appeals was under no conceivable obligation to review a sentence that was well within the permissible range of punishment provided by statute.

as a loser," it was given minimum scrutiny by the court. Petitioner's claims are totally unsupported by anything in the record. Petitioner's case was thoroughly briefed by appellate counsel, and carefully considered by the court, as attested by the court's memorandum opinion (Pet. App. 3-12). As the court of appeals stated in denying petitioner's motion to recall the mandate (Pet. App. 1-2):

> This case was thoroughly briefed and argued by able and experienced counsel. The judges on this panel carefully reviewed and considered all of the arguments raised on appeal. Many hours of judicial time was [sic] spent on this appeal. Any conception by counsel that thorough consideration of every case is not given by the members of this court and the judges sitting by designation, regardless of how that case happens to be inventoried, is completely erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

DEBORAH WATSON
Attorney

MARCH 1982

DOJ-1982-03

Petitioner's Reply Brief

FILED
MAR 19 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1001

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

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UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY

ROBERT M. CIPES
COUNSEL FOR PETITIONER
1482 East Valley Rd., A109
Santa Barbara, CA 93108

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PETITIONER'S REPLY

With commendable candor the Government concedes, at least for purposes of argument, that "The reporter's failure to transcribe the ancillary [sic] proceedings and the district court clerk's failure to ensure that the record contained

such transcripts before certifying the record as complete and transmitting it to the court of appeals, constituted violations of the Federal Rules of Appellate Procedure..." (Brief in Opp., pp. 5-6) The Government goes on to argue, however, that "the violations were harmless."

A determination as to whether an error was harmful or harmless obviously cannot be made in a factual vacuum. The significance of the transcript omissions can be assessed only by examining the transcripts themselves in the context of the entire record, a task which has yet to be performed in this case. A remand for this purpose to the court of appeals seems to be indicated.[1] For in

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1. Among the questions that can be resolved upon remand, if the Court deems it necessary, is whether petitioner's appellate counsel simply overlooked the transcript omissions or made a conscious and deliberate decision to proceed notwithstanding such omissions. Although there is nothing whatever in the record on this subject (see Pet. 16) the Government in its opposition brief makes repeated references to a fictitious waiver on the part of appellate counsel.

failing to exercise its discretion in ruling on the instant motion the court of appeals "has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision." Rule 17.1 (a).

It should be noted, contrary to the assertion in the Government's brief (p. 5, n. 5), that the court reporter has yet to produce all of the designated transcripts. On November 30, 1981, counsel received transcripts of the sentencing of November 3, 1978, and of the proceedings of September 22, 1978, at which petitioner was arraigned on the superseding indictment and extensive argument was heard on a pretrial discovery motion, as well as on a motion to dismiss the indictment for alleged infringement of petitioner's right to counsel (based upon events occurring at the time of petitioner's initial appearance before the magistrate under Criminal Rule 5).[2]

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2. The obvious purpose of my letter to the Court of December 7, 1981, was to modify an assertion in the petition in the light of subsequent events, not to invite this Court to assume a fact-finding

Footnote 5 of the opposition brief also states that "petitioner's initial appearance and arraignment was [sic] not stenographically recorded; pursuant to court practice in the Western District of Washington, these proceedings were recorded on tapes which were then stored in the magistrate's office." This statement reveals an obvious violation of 28 U.S.C. § 753 (b) and of course completely begs the question why these designated proceedings were not part of the record on appeal and have not yet been produced by the reporter in response to present counsel's repeated requests.[3]

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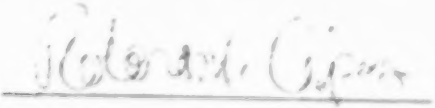
role with respect to material not in the record below. In no way is my silence in this regard to be taken as a tacit admission that these two transcripts are insignificant or irrelevant. On the contrary, I am prepared to argue, if requested to do so by the Court, that "the omitted transcripts reveal[ed] reversible error or at least contain[ed] information pertinent to the prior decision." (See Brief in Opp., p. 4)

3. The contents of the initial appearance tape are important in the light of the hotly disputed Sixth Amendment motion, referred to above, and the question of the alleged investigative bias of FBI Agent Rudy whose abortive arrest attempt led to petitioner's flight.

Finally, with further reference to the Government's footnote 5, the question as to possible omission of certain transcripts of "trial proceedings held outside the presence of the jury" was prompted by the obvious omission from the trial transcript of the Court's rulings on requests to charge. (See Tr. 794). This omission may have resulted from the court reporter's failure to record pre-charge discussions held in open court, which would constitute a separate violation of 28 U.S.C. § 753 (b).

Respectfully submitted,



Robert M. Cipes
Counsel for Petitioner